

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**KARL A. DAY,**

***Plaintiff***

**v.**

**LOUIS W. SULLIVAN, M.D.,  
in his capacity as Secretary of  
Health and Human Services,**

***Defendant***

***Civil No. 91-117 B***

***REPORT AND RECOMMENDED DECISION***<sup>1</sup>

This Social Security Supplemental Security Income appeal raises the question whether the Secretary erred by finding that the plaintiff could return to his past relevant work as a heavy equipment operator. Specifically, the plaintiff asserts that the Secretary erred by concluding that he performed past relevant work as a heavy equipment operator, by failing to make detailed findings explaining the Secretary's reliance on the vocational expert's answers to hypothetical questions, by failing to make the proper inquiries into the plaintiff's allegations of pain and the extent and severity of his asserted mental health impairments and by the Appeals Council's finding that new evidence presented did not provide a basis for changing the Administrative Law Judge's decision.

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<sup>1</sup> This action is properly brought under 42 U.S.C. ' 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 29, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since the alleged date of onset of disability, Finding 2, Record p. 20; that he suffers from ``status post septic bursitis of the right elbow, surgically drained, with mild residual discomfort; status post craniotomy, as treatment for head trauma which caused a subdural hematoma, with post surgical mild skull deformity and some residual cephalgia, relieved by medication; mild chronic obstructive pulmonary disease; post traumatic arthritis in the MCP joint of the left thumb; visual refractive error, partially corrected; and mild depression," Finding 4, Record p. 20; that he does not suffer from any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 5, Record p. 20; that he has no difficulty sitting, standing, bending or squatting and can lift up to 50 pounds frequently and up to 100 pounds occasionally, although he cannot carry any amount of weight further than ten feet, Finding 9, Record p. 20; that he has mild intermittent pain, exacerbated by movement and by inclement weather, headaches that are controlled by medication and mild shortness of breath when the temperature exceeds 85 degrees, Findings 9-10, Record p. 20; that he has mild deficits in his ability to concentrate and in the grip strength of his non-dominant left upper extremity, Finding 11, Record p. 20; that his allegations concerning the extent of his impairment and its impact on his ability to work are out of proportion to the objective medical evidence and not fully credible, Finding 12, Record p. 20; that he has at all relevant times retained the residual functional capacity to return to his past light, semi-skilled work as a heavy equipment operator, Finding 13, Record p. 20; and that, accordingly, the plaintiff is not disabled, Finding 14, Record p. 21. The Appeals Council declined to review the decision,<sup>2</sup> Record pp. 2-3, making it the final

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<sup>2</sup> The Appeals Council's decision included evaluation of new evidence presented by the plaintiff in

determination of the Secretary. 20 C.F.R. ' 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

### **Allegations of Pain**

The plaintiff asserts that the Secretary erred by not crediting his allegations of pain. Day testified that he suffers from pain in his back, right elbow, arm, shoulder and left thumb and of dizziness, shortness of breath and headaches. Record pp. 28-34. He also asserts that movement and hot weather exacerbate some of his maladies. *Id.* pp. 30, 32-34. He stated that he takes aspirin and Dilantin, a prescription medication, for his headaches. *Id.* p. 30. Only two medical evaluations of the plaintiff are presented in the record and both were performed in 1990, eight years after the plaintiff alleges he became disabled. *Id.* pp. 6-9, 108-19. In the first report the physician concludes, in pertinent part, that the plaintiff exhibits: `` (2) Probable mild chronic obstructive pulmonary disease. (3) Probable history of bursitis in the right elbow with residual right elbow and arm discomfort, ? degenerative arthritis. (4) Probable post-traumatic arthritis in the MCP joint of the left thumb. . . . (9) Taking Dilantin, reason unclear." *Id.* pp. 114-15. The second report relates treatment that the

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the form of his treatment records from June 25, 1990 through October 3, 1990 at the Kennebec Valley Medical Center. Record p. 2. While acknowledging that the records suggest new impairments or conditions, the Appeals Council found that they did not provide a basis for changing the Administrative Law Judge's decision. *Id.*

plaintiff received for a swollen testicle, *id.* p. 7, and adds nothing to this case. Day stated that his activities include cooking, cleaning, planting a garden in the summer, visiting with friends, driving and shopping for groceries. *Id.* pp. 35, 37, 95.

In conformity with the first step of the procedure for evaluating pain set forth in *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986) (construing instructions for the Secretary's Program Operations Manual System DI T00401.570), and Social Security Ruling 88-13, the Secretary elicited testimony from Day that he has injuries that cause pain. The second step of *Avery* requires the Secretary to carefully consider the plaintiff's subjective complaints of pain. *Avery*, 797 F.2d at 23. The Administrative Law Judge's full inquiry into Day's daily activities and pain complaints complied with this step as well.

The Secretary is entrusted with determining the credibility of a claimant's allegations of pain and exertional limitations. *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). The Administrative Law Judge explained that he discredited the plaintiff's allegations because Day's daily activities, his lack of medical treatment, the fact that he takes no non-prescription pain medication, and the fact that the consultative examiner who examined him in 1990 identified no functional limitations are inconsistent therewith. Record p. 19. There is simply no evidence in the record to suggest that the Secretary failed to properly evaluate the plaintiff's pain allegations.

### **Past Relevant Work**

The plaintiff asserts that the Secretary failed to make the requisite findings -- such as the training and driver's license required -- to conclude that Day performed and is still capable of performing past relevant work as a heavy equipment operator. He also contends that the Secretary improperly relied on a vocational expert's answer to a hypothetical question as the basis for his

decision and that the Secretary failed to make the requisite findings regarding the plaintiff's asserted mental health impairment.<sup>3</sup>

Day testified that he has no difficulty sitting or standing, except that after sitting for very long he must move about in his chair. Record pp. 36-37. He admits that he can lift 50 pounds but states that it would bother him to do so and that his ability to carry is limited. *Id.* pp. 37-38. He further asserts a limited capacity for gripping with his left hand due to an impairment to his left thumb and states that his ability to lift is restricted by pain in his back and arms. *Id.* pp. 44-46.

The plaintiff stated in a vocational report that he used a ``dump truck, loader, [and] dozer" while performing construction work from the 1950s through 1978. *Id.* p. 96. In addition, Day testified that for a couple of years he drove a ``ten-wheeler . . . around the farm . . . , not out on the road." *Id.* p. 40. The plaintiff asserted that shifting gears was the only exertional requirement for this job; no lifting requirement was mentioned. *Id.* pp. 40-41. In response to a question by the vocational expert at the hearing, Day also stated that he only has a regular driver's license permitting him to drive a car and that he had not received training for driving a ten-wheeler because ``[b]ack then I didn't have to, didn't have to have the class way on your license." *Id.* p. 47. Day also testified that now he is

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<sup>3</sup> The plaintiff also asserts that the second hypothetical question posed to the vocational expert did not take account of his use of Dilantin to control headaches. This assertion is contradicted by the record. In stating the hypothetical the Administrative Law Judge included the following assumption: ``[T]he claimant is a 50-year old gentleman, with a seventh-grade education who cannot read or write . . . [and] his headaches are controlled by his medication. And as long as he takes the medication he doesn't experience them." Record p. 52.

unable to perform the job because the shifting movements would hurt his arm and back, as would the bouncing around in the vehicle while driving. *Id.* pp. 42-43.

The vocational expert, Cynthia Flint-Ferguson, testified at the hearing that: ``In theory, Mr. Day has performed the duties of heavy equipment operator. Based on his training for that position, as well as his testimony, I would find this work to be light-duty semiskilled. . . . The only skill that I would find would be operating the hand and foot controls necessary to operate a variety of equipment," which often requires ``a good deal of force." *Id.* pp. 47-48, 51. The Administrative Law Judge posed two hypothetical questions to Flint-Ferguson that differed from each other mainly in the level of pain and capacity for lifting that they attributed to the plaintiff. *Id.* pp. 55-57. In the first question Flint-Ferguson was asked to assume that the plaintiff experiences moderate pain and can lift up to 50 pounds; the second question assumed that Day feels only mild pain and can lift 50 pounds frequently and 100 pounds occasionally. *Id.* pp. 48-50, 52-53. Flint-Ferguson testified that if Day felt moderate pain he would be unable to perform the work, *id.* pp. 50-51, but that if the pain he felt was mild he would be capable of doing so, *id.* p. 53.

The Administrative Law Judge concluded that Day ``has no difficulty sitting, standing, bending, or squatting" and that he ``can lift up to 50 pounds frequently." Finding 9, Record p. 20. Furthermore, he found that Day has the residual functional capacity to return to his past job as a heavy equipment operator, basing his opinion on Flint-Ferguson's answer to his second hypothetical. Record p. 19.

At this stage of the evaluative process, Step Four, the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote*, 690 F.2d at 7. In determining ability to perform past relevant work, the Secretary must determine whether an individual can do his ``usual work or other applicable past work." 20 C.F.R. ' 416.961. This means that a claimant will be found not

disabled if he can perform `` (1) [t]he actual functional demands and job duties of a particular past relevant job; or (2) [t]he functional demands and job duties of the occupation as generally required by employers throughout the national economy." Social Security Ruling 82-61, reprinted in *West's Social Security Reporting Service* at 838 (1983) (emphasis in original). To accomplish this task the Secretary must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding of whether the plaintiff's residual functional capacity would permit performance of that work. *May v. Bowen*, 663 F. Supp. 388, 391 (D. Me. 1987); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* at 813 (1983); 20 C.F.R. ' 416.920(e).

The Court of Appeals for the First Circuit has held that these findings need only be made when the claimant has first made a reasonable threshold showing of an inability to return to his past work because of his alleged disability. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). This simply involves ``describ[ing] those impairments or limitations which [he] says [he] has" and how these limitations ``preclude[] the performance of the particular prior job." *Id.* at 5 (emphasis in original). ``Once this threshold is crossed, the [Administrative Law Judge] has the obligation to measure the requirements of former work against the claimant's capabilities; and, to make that measurement, an expert's [residual functional capacity] evaluation is ordinarily essential unless the extent of functional loss, and its effect on job performance, would be apparent even to a lay person." *Id.* at 7. In order to make the required findings, ``[r]easonable inferences may be drawn, but presumptions, speculations and suppositions must not be used." Social Security Ruling 82-62, at 813. Therefore, the Secretary must conduct a detailed inquiry and elucidate a sound rationale for his findings:

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision. Since this is an important and, in some instances, a controlling issue, every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit.

*Id.* at 812.

The plaintiff asserts that the Secretary failed to show that Day ever performed the job of heavy equipment operator and that he has the proper license and training to perform the job. However, despite Days' contentions to the contrary, the plaintiff's vocational report clearly indicates that he operated heavy equipment, such as a dump truck, loader and dozer. Furthermore, while it is true that the hypothetical questions posed by the Administrative Law Judge failed to specify the status of Day's driver's license or level of training, the plaintiff did not specify any license or training requirements for his job. ``The claimant is the primary source for vocational documentation," Social Security Ruling 82-62, at 811. Yet, in response to a question by the vocational expert the plaintiff stated that no special license or training was required. It is incumbent upon the claimant to show that his prior work requires training and a license which he does not possess. This he has failed to do.

As asserted by the plaintiff at oral argument, the Administrative Law Judge's finding as to the plaintiff's lifting capacity is unsupported by the record, which only indicates that he can lift 50 pounds and that it hurts him to do so. However, by the plaintiff's own testimony his past job requires no lifting. Thus, this error is of no consequence. The plaintiff's testimony, as well as that of the vocational expert, does establish that Day's past relevant work as a heavy equipment operator requires the ability to operate hand controls with substantial force. Day alleged at the hearing that an impairment to his arm prevents him from performing the shifting movements required by this job. In doing so, he alerted the Secretary to the practical consequences of his alleged impairment requiring the Secretary to



make the three findings dictated by Social Security Ruling 82-62 -- which include a finding of the plaintiff's residual functional capacity. *Santiago*, 944 F.2d at 6-7.

Although the Administrative Law Judge found that Day is capable of performing the light unskilled work required by his past relevant work, he made no specific finding as to the plaintiff's capacity for operating the necessary controls. Even if this finding could be deemed an adequate evaluation of the plaintiff's residual functional capacity --which is doubtful -- it amounts to a medical opinion, which is not within the province of the Secretary. The Secretary may not exercise his lay judgment as to a claimant's residual functional capacity for light work, because of its demanding exertional requirements, such as the significant force needed to operate the hand controls of heavy equipment. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). Instead of obtaining the opinion of a medical expert to determine his ability to perform light work, the Secretary impermissibly relied on the plaintiff's failure to demonstrate his inability to perform the shifting movements that his past relevant work requires. *See Santiago*, 944 F.2d at 7.

Day further contends that the Secretary erred by relying on the vocational expert's opinion as to whether he is capable of performing his past relevant work. The plaintiff is correct. Even assuming, without deciding, that the Administrative Law Judge was entitled to ask Flint-Ferguson for her opinion as to the requirements of the plaintiff's past relevant work, *but see Smith v. Bowen*, 837 F.2d 635, 637 (4th Cir. 1987), it was error to ask her the ultimate question whether Day has the capacity to perform that work. Whether Day is capable of working as a heavy equipment operator is for the Secretary alone to decide.

Finally, the plaintiff contends that the Secretary failed to make the requisite findings as to the extent and severity of his asserted mental health impairments. The only evidence in the record suggesting that the plaintiff suffers from such an impairment consists of his brief responses, mostly a simple "yeah," to several leading questions by the Administrative Law Judge about whether he has

experienced some mental stress, depression or crying episodes or ever contemplated suicide.<sup>4</sup> *Id.* pp. 38-39. In response to the question whether he believed that he would benefit from treatment for depression, Day again responded ``yeah" but commented that he had never received treatment because he could not pay for it. *Id.* p. 38.

There is very little discussion of the plaintiff's mental health in the Administrative Law Judge's decision. He notes Day's assertion that ``sometimes he gets depressed, but that he has not received treatment for depression; that he is short tempered; that he sometimes cries; that he has thoughts of suicide." *Id.* p. 18. Thereafter, in recounting the facts set forth in his hypothetical questions at the hearing, the Administrative Law Judge notes that he asked the vocational expert to assume that the plaintiff ``suffered from mild depression." *Id.* pp. 18-19; *see id.* pp. 50, 53. Indeed, he made a specific finding stating as much. Finding 4, Record p. 20. The Administrative Law Judge also concluded that ``to the extent the claimant's testimony and written allegations can be construed as indicating that he is more functionally limited than indicated in [the] hypothetical question, his allegations are greatly out of proportion to the objective medical evidence of record (which is rather minimal) and are not fully credible to the extent alleged." Record p. 19.

Unlike his assertion that he is unable to operate hand controls, Day's contention that he has a mental health impairment does not afford a basis for remand. ``[N]ot only must the claimant lay the foundation as to what activities [his] former work entailed, but [he] must point out (unless obvious) -- so as to put in issue -- how [his] function incapacity renders [him] unable to perform [his] former usual work." *Santiago*, 944 F.2d at 5. Having failed to indicate any job requirements that he would be unable to fulfill due to the state of his mental health, Day has not met his threshold burden which would then require the Administrative Law Judge to evaluate the effects of his asserted impairment. *See id.* at 5, 7.

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<sup>4</sup> At oral argument, the plaintiff contended that the ``new" medical reports he presented, *see* Record pp. 5-9, indicate that he has a substance abuse problem. Upon examining those reports, I find his assertion meritless.

## **New Evidence**

Day asserts that the Appeals Council erred in not granting review of his case and in finding that the additional medical evidence submitted did not provide a basis for changing the Administrative Law Judge's decision.

The Appeals Council considered the new evidence presented by the plaintiff but did not grant a review. The new evidence consists of medical reports from the Family Medicine Institute of Kennebec Valley Medical Center regarding treatment that Day received from June 25 through October 3, 1990. Record pp. 5-9. The reports are dated four days after the June 21, 1990 hearing before the Administrative Law Judge, and the first report makes reference to a visit one month prior to the date of the report. *Id.* p. 6. At the hearing, Day testified that he had received medical treatment for a swollen testicle, which is the primary reason for his visit to the Medical Center as well as the primary subject of the medical reports. *Id.* pp. 35-36; *see id.* pp. 5-9. Other than tracing his recovery from the swollen testicle, the reports merely make some mention of his general condition. The final report, dated October 3, 1990, concludes, ``Resolved testicular swelling!" and simply notes that although ``he feels well" his knees hurt. *Id.* p. 9.

The Appeals Council will review a case if the evidence presented is new and material and relates to the period on or before the date of an administrative law judge's decision. 42 C.F.R. ' 416.1470(b). In such circumstances the Appeals Council will grant a review only if it finds that the administrative law judge's decision is contrary to the weight of the evidence in the current record. *Id.* Besides concluding that Day's testicular swelling had subsided, the reports make no mention of any functional limitations or disabling impairments. Therefore, the Secretary was justified in finding that

these medical reports were insufficient to serve as a basis for changing the Administrative Law Judge's decision.

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 2nd day of July, 1992.*

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*David M. Cohen  
United States Magistrate Judge*